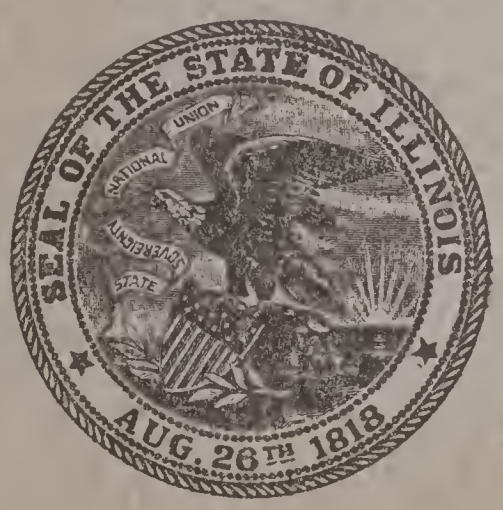
CONSTITUTIONAL CONVENTION

BULLETIN NO. 3

The Amending Article of the Constitution



Compiled and Published

By the

LEGISLATIVE REFERENCE BUREAU

Springfield, Illinois

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I. SUMMARY.

Constitutional change in Illinois is extremely difficult and in this respect Illinois ranks with a small group of states which make constitutional amendments difficult if not impossible.

As suggested in this pamphlet, it is desirable to keep temporary details out of the constitution. However, the state constitutional development in this country since 1850 has been toward placing a greater amount of detail in the constitutional text. If details are to be placed in the constitutional text, it is of course necessary that some provision be made for easy alteration of such detail when it has been outgrown or when change becomes necessary. Illinois constitutions of 1848 and 1870 have contained a large amount of detail but have not provided a ready means for prompt alteration of this detail.

In Illinois, as in all of the other states except New Hampshire and probably Rhode Island, two methods of constitutional alteration exist: (a) alteration through the assembling of a constitutional convention, and (b) alteration through specific proposal by the representative legislature or by the popular initiative. In planning any amending clause for Illinois care should be taken that the two methods of constitutional alteration are considered together.

A constitutional convention is a cumbersome piece of governmental machinery intended for use only in case a complete revision of the constitution is desired or in case matters of fundamental importance are to be dealt with. It is for this reason that the states have provided other methods of constitutional change for matters of less fundamental importance. New Hampshire, however, has adhered to the plan of constitutional conventions for the proposal of all changes, and provides for a popular vote upon the holding of such a convention at the end of each seven year period. Constitutional conventions have been assembled in New Hampshire in 1902, 1912, and 1918-19. The provisions for constitutional amendment through legislative proposal in the Illinois constitution of 1848 were so cumbersome that a constitutional convention was substantially the only method for changing a mass of temporary detail which almost immediately required change. It was for this reason that a constitutional convention was assembled in 1862, and when the work of this convention was rejected another convention became necessary in 1869-70. It should not be necessary to assemble constitutional conventions except at long intervals, but the pressure for the assembling of such a convention will necessarily be great if the method provided for specific amendment is not relatively simple.

The Illinois constitution of 1870 makes the specific amendment of the present constitution difficult. This difficulty is occasioned not so much by any one thing as by the fact that several provisions of the present amending clause unite to present obstacles to change. The present constitution provides that (a) the general assembly shall have

no power to propose amendments to more than one article at the same session nor to the same article oftener than once in four years, (b) that two-thirds of all members elected to each of the two houses must concur in order to propose a constitutional amendment, (c) that proposed amendments shall be approved by a majority of the electors voting at a general election.

A plan which would probably meet all requirements would be that of making the assembling of a constitutional convention relatively difficult, but of making the proposal of specific amendments relatively easy.

In a pamphlet on the initiative and referendum there is a rather full discussion of the initiative as applied to constitutional amendments. Some matter relating to the initiative as applicable to constitutional amendments appears also in this pamphlet. If the initiative for constitutional amendments is to be adopted, the easier process of specific amendment will of course include two methods of proposing constitional changes.

In the preparation of this pamphlet a table of constitutional changes proposed and adopted in all of the states since 1900 has been prepared. Some of the statements in this pamphlet are based upon this material. It has seemed unnecessary to publish these tables, but they will be available for any one desiring to analyze the operation of amending methods in this and other states.

In Bulletin No. 1 an extended review will be found of constitutional changes which have taken place since 1900. Seven new constitutions have been adopted since 1900: Alabama (1901), Virginia (1902), Oklahoma (1907), Michigan (1908), Arizona (1911), New Mexico (1911) and Louisiana (1913). Proposed new constitutions have been rejected in Connecticut (1902, 1907) New York (1915) and Arkansas (1918). Constitutional conventions in Massachusetts (1917-19), New Hampshire (1902, 1912) and Ohio (1912) submitted proposals of amendment rather than complete new constitutions.

Since 1900, more than fifteen hundred amendments have been proposed in the forty-eight states, of which about nine hundred have been adopted. Of this number, one hundred and fifty were submitted in California, one hundred and thirty-four in Louisiana and eighty-eight in Oregon.

California has a detailed constitution (which is steadily becoming more detailed), and has a long established practice of adopting frequent constitutional changes. Eighty-four of the one hundred and fifty amendments in this state were submitted before the initiative was available for this purpose, and of the sixty-six submitted in the period 1912-1918, fifty-one were proposed by legislative action, so that the popular initiative can hardly be credited with the frequent proposal of amendments.

Louisiana, which does not have the initiative but has an elaborate and complex constitution, has had since 1900 not only one hundred and thirty-four proposed amendments but also a constitutional convention. Of the eighty-eight proposals submitted in Oregon since 1900, forty-three were proposed by initiative petition.

II. ILLINOIS EXPERIENCE.

Historical Account: The Illinois constitution of 1818 provided for the alteration of that instrument only through the medium of a constitutional convention. Practically all the states came, after experience, to a realization that specific constitutional amendments might often be desirable, and the assembling of a convention for the purpose of proposing one or two slight amendments is both cumbersome and expensive The constitution of 1848 was, therefore, in line with the general development in other states when it provided for the proposal of amendments by legislative action as well as through the assembling of a constitutional convention.

The proposed constitution rejected in 1862 made somewhat fuller provisions regarding a constitutional convention than did the constitutions of 1818 and 1848, specifically requiring that alterations made by a convention should be submitted to the people for adoption or rejection. The proposed constitution of 1862 left unaltered the provisions of the constitution of 1848 for legislative proposal of amendments, with the exception that the general assembly was to have power to propose amendments to no more than two articles of the constitution at the same time.

In the convention of 1869-70, difficulty presented itself with respect to the oath to be taken by delegates and also with respect to the filling of vacancies in the convention. To meet these difficulties for the future and to make the convention clause more specific, detailed provisions were adopted as to the composition and organization of a constitutional convention, and it was also required that the work of a convention be submitted to the electors for ratification.

With respect to the power of the general assembly to propose amendments, important changes were made. The constitution of 1848 required the action of two successive sessions of the general assembly for the proposal of constitutional amendments, and the constitution of 1870 simplified the procedure by providing for proposal as a result of one action of the general assembly.

In two other respects, however, the amending process in the constitution of 1870 was made more difficult than that of the constitution of 1848. The constitution of 1848 provided that "the general assembly shall not have power to propose an amendment or amendments to more than one article at the same session". To this provision the constitution of 1870 added the provision that amendments should not be proposed to the same article oftener than once in four years.

The constitution of 1848 provided that an amendment proposed by the general assembly should be submitted at the next general elec-

tion, and should be adopted if "a majority of all the electors voting at such election for members of the house of reperesentatives shall vote for such amendment". The constitution of 1870 provides that submission shall be at the next election of members of the general assembly, and that the amendment shall be adopted if approved by "a majority of the electors voting at said election".

Although in certain respects an amendment of the constitution of 1870 was made more difficult than that of previous constitutions, it is hardly accurate to say that the present constitution is more difficult to amend than previous constitutions. The difficult and cumbersome method of proposing amendments by the legislature under the constitution of 1848 prevented constitutional change, and only one amendment was proposed to the people between 1848 and 1870. In spite of the added difficulties imposed by the constitutional convention of 1869-70, it may be said that each new constitution in Illinois has been easier to amend than the preceding constitution.

One point, however, was not sufficiently considered by the framers of either the constitution of 1848 or of the constitution of 1870. The constitution of 1818 contained little detail, and on that account would not have required as frequent change as the later constitutions. The framers of the later constitutions however did not realize that they were placing in the constitutions a mass of detail, which must be subject to relatively easy change, and did not adjust their amending methods to this fact. If a constitution is to deal with nothing but matters of fundamental and permanent importance, it may properly be difficult to alter, although one generation can hardly determine finally what are to be matters of fundamental and permanent importance for the next generation. If numerous details are to be placed in a constitution, some provision must be made for the ready alteration of such details or the constitution becomes a permanent bar to progress. The framers of the constitutions of 1848 and 1870 placed a large amount of detail in these constitutions, and at the same time adopted amending processes for these constitutions upon the assumption that the constitutions contained only matters fundamental in character and unchanging in principle. These two attitudes were necessarily conflicting and produced serious difficulties.

Amending clause of the constitution of 1870: The amending clause of the constitution of 1870 is, as has been suggested above, simpler than was the amending clause of 1848. However, into the clause of 1870 were inserted two provisions which have made difficulty, although as to one of them at least this difficulty probably could not have been foreseen by the members of the convention of 1869-70.

The points of difficulty in the constitution of 1870 are: (a) The limitation against the proposal of amendments to more than one article of the constitution at the same session, or to the same article oftener than once in four years. (b) The requirement of a two-thirds vote of all members elected to each of the two houses in order to propose a

constitutional amendment, and (c) The provision that proposed amendments shall be approved by a majority of the electors voting at the general election.

Limitations upon the proposal of amendments: The provision against the proposal of amendments to more than one article of the constitution at the same session first appeared in the constitution of 1848. With respect to the operation of this limitation in the constitution of 1848 Mr. Dement said in the convention of 1870: "Such were supposed to be the defects of the present constitution in several of the articles, that the persons whose attention was directed to abuses in the judiciary department of the state would not propose an amendment unless to that article. Others who viewed the objections to the executive or legislative articles as more serious, insisted that those were the articles that should be first amended—or one of those articles; and the consequence was the general assembly could not unite a majority of two-thirds in favor of any one amendment.[1] This situation has continued in the constitution of 1870. More than one amendment may be proposed at the same session if several proposed amendments relate to the same article of the constitution. So, for example, proposals to abolish cumulative voting and establish the initiative and referendum in legislation may under the present constitution be submitted at the same session of the general assembly. But if only one were submitted, the other could not be proposed within the succeeding four years. However, where several amendments to the constitution have been urged at the same time, they have usually related to different articles. In as much as proposed amendments to different articles could not be submitted at the same session, deadlocks naturally resulted among the groups favorable to the amendment of different articles, just as in the period before 1870. It was suggested in 1870 that if more than one amendment could be proposed at the same time, there would be "log rolling" among the advocates of various amendments. An equally serious danger has resulted in the present constitution in that deadlocks may prevent any proposed change, and in that the opponents of a proposed amendment may hide their opposition by advocating some other proposal at the same time.

Aside from the possibility of deadlock presented by the constitutional provision here under discussion, another difficulty presents itself in that a matter sought to be handled by amendment may be dealt with by two separate articles of the constitution. For example, any initiative and referendum proposal both for legislation and for constitutional amendments would have had to alter two articles of the present constitution. In this as in many other cases, but one subject is involved, but to handle that subject as a unit is impossible under the present rule.

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[1] Debates and Proceedings, Illinois Constitutional Convention, 1869-70, II, 1315.

Each article of the constitution is bound up more or less closely with every other article, and in amending one, some change is apt to be worked in others. With reference to this matter, however, the Supreme Court of Illinois has taken a liberal and common-sense view and has said that the restriction in the constitution "was not intended to prevent implied amendments or changes which were necessarily worked in other articles of the constitution by the express amendment of a particular article of the constitution. Any other view would be so narrow as to prohibit the general assembly in many, if not in all cases, from proposing amendments to a particular article of the constitution, as the several articles of the constitution are so far connected and dependent upon each other that a change in any article generally, if not universally, has the effect to produce changes of more or less importance in one or more of the articles of the constitution other than that which is expressly amended."[2] But this interpretation gives no aid with respect to a proposal which may require changes directly or expressly in more than one article of the constitution.

The limitation that amendments may not be proposed to the same article oftener than once in four years has not made any apparent difficulty since it was inserted in the constitution of Illinois. This has been primarily because the "one article at a time" clause has discouraged amendments and prevented the raising of a situation in which the four-year limitation might operate. Had the other limitation not been present, it is possible that the four-year limitation would have proven an obstacle to amendments. Where an article of the constitution contains as many and as distinct provisions as does the legislative article, there seems to be no logical reason for the four-year limitation. This is especially true in view of the fact that two or more amendments to the same article may be proposed and submitted at the same time under the present constitutional provisions.

Legislative proposal of amendments: The constitution of 1848 required the action of two successive sessions of the general assembly, this action to be taken by two-thirds of all the members elected to each of the two houses in the first session, and by a majority of all the members elected to each house in the second session. The constitution of 1870 simplified this machinery very materially by providing for submission to the people after an affirmative vote of two-thirds of all the members elected to each of the two houses. The requirement of action by two successive legislatures had proven unnecessary, not only in Illinois but in other states, and the tendency in other states has been to discard such a requirement.

The two-thirds vote required by the present constitutional provision would probably not have proven essentially difficult had other limitations upon the amending process not existed. In the states providing for the proposal of constitutional amendments by one legislature only, the more common requirement is that the proposal be one by two-

[2] City of Chicago v. Reeves, 220 Ill. 284 (1906).

thirds of the members elected to each of the two houses, although some states require a three-fifths vote, and recently there has been a tendency to require merely a majority vote.

Popular vote required for the adoption of amendments: As has already been indicated, the constitution of 1870 requires that a proposed amendment shall receive the votes of a majority of the electors voting at the next election of members of the general assembly. The constitution of 1848 on the other hand provided for adoption upon the vote of a majority of all the electors voting at the next general election for members of the house of representatives. The framers of the constitution of 1870 do not seem to have intended to make the adoption of a constitutional amendment by popular vote more difficult, but such a result was actually accomplished by a slight change in phraseology.

The constitution of 1848 provided that amendments should be submitted at the next general election and "if a majority of all the electors voting at such election for members of the house of representatives shall vote for such amendment or amendments, the same shall become a part of the constitution." The constitution of 1870 provides that proposed amendments "shall be submitted to the electors of this state for adoption or rejection, at the next election of members of the general assembly, and if a majority of the electors voting at said election shall vote for the proposed amendments they shall become a part of this constitution". In view of the fact that the highest vote at a general election is apt to be larger than the votes for members of the general assembly, the constitution of 1870 under present voting methods imposes a higher standard of popular vote than did the constitution of 1848. However, this would probably not have been the case in 1870, and there was much plausibility in the contention that the language of the two constitutions was intended to mean the same thing, although, narrowly construed, the language of the constitution of 1870 said something different from that of the constitution of 1848. This view was rejected by a divided court in People v. Stevenson.[3]

The form of ballot employed in Illinois at different periods has had a pronounced influence upon the result of popular voting. Before 1848 viva voce voting was permitted by the constitution of Illinois. Under this plan when the voter approached the polls he was asked not only to name his choice of candidates but also to vote "yes" or "no" upon any measure that may have been pending. Under the circumstances it was easier to vote than to refuse to answer. This in part explains the fact that the vote in this state upon the question of calling a convention in 1824 was almost equal to the total vote cast for candidates at the same election.

The printed ballot has been in use in Illinois since 1848. Until 1891, however, the printing of ballots devolved upon political parties,

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[3] 281 Ill. 17 (1917).

and the parties could either: (1) omit all mention of the proposed amendment from their ballots; (2) print the measure in such a way as to leave the voter an option to vote for or against it, or (3) to print either the affirmative or the negative of the measure. The third alternative was the one usually taken advantage of, and every straight party vote was therefore cast in accordance with the party action which appeared upon the ballot. Upon a ballot of this character it was easily possible to cast upon a measure substantially the same vote as that cast by regular voters upon candidates. For this reason the framers of the constitution of 1869-70 would probably have had little if any notion of difficulty being occasioned by the variation in language as to the popular majority required for the approval of constitutional amendments.

An official ballot act was adopted in 1891 and constitutional amendments were, during the period from 1891 to 1899, printed upon the official ballot for candidates with blank spaces for a vote upon either side of the question. During this period, with measures printed upon and usually at the bottom of the candidates ballot, less than twenty-five per cent of those voting in the elections expressed themselves upon measures. The party column ballot did not permit of any satisfactory adjustment for voting upon questions, and the only persons voting upon measures were those who searched out the measures upon the printed ballot. In 1899 legislation was enacted providing for a separate ballot for measures, and with a separate ballot the number of votes upon measures almost immediately doubled. The voters' attention was directly called to the measures being submitted, for the so-called "little ballot" for measures was handed to the voter, together with the ballot for candidates. It became as easy to vote upon the measures as to refrain from doing so.

Upon measures whose importance was not relatively different, it was easy to get out a large vote before 1891, impossible between 1891 and 1899, and difficult though not impossible since 1899.

Upon the constitutional amendment adopted in 1904 the requisite vote was obtained only after an expensive campaign. Upon the amendment of 1908 all parties were united and a vigorous campaign was conducted. Upon the proposed tax amendment of 1916 a vigorous campaign was conducted but this proposal failed, although the favorable vote was 656,298 as against 295,782. The favorable vote was not a majority of the total vote at the election, which was 1,343,381.

The matter here discussed is of course entirely unrelated to the terms of the constitution, but it indicates the extent to which ballot forms may determine the ease or difficulty of operating under a constitutional provision. In 1870 the popular vote required by the constitution would have been relatively easy to obtain upon almost any measure as to which the favorable sentiment was stronger than the opposition, and the same situation substantially continued until 1891. Between the years 1891 and 1899 it would have been practically impossible to adopt any constitutional change because of the ballot form then in use. Since 1899 a proposed constitutional amendment may be

adopted if public sentiment is sufficiently united and if a sufficiently vigorous campaign is made, although the chances even then are against the proposal.[4]

Constitutional convention under the constitution of 1870: Under the constitution of Illinois the following steps are necessary in order to obtain constitutional revision through a convention: (1) submission to the electors of the question as to whether a constitutional convention should be called, this submission requiring a vote (entered upon the journals thereof) of two-thirds of the members of each house; (2) vote for a convention by a majority of the electors voting at the next general election; (3) action by the next general assembly providing for a convention; (4) meeting of the convention within three months after the election of its members and the preparation of "such revision, alteration or amendments of the constitution as shall be deemed necessary"; (5) approval of such proposed changes by a majority of the electors voting at an election appointed by the convention for that purpose, not less than two nor more than six months after the adjournment of the convention.

Since 1909 a systematic and continuous effort has been made to obtain a constitutional convention in this state, and earlier attempts had been made beginning with the year 1884. It is difficult to obtain a vote of two-thirds of the members of each house, and equally difficult to obtain the approval of a majority of the electors voting at the next general election. However these difficulties were overcome in 1917 and 1918 and the general assembly by legislation in 1919 provided for the assembling of the constitutional convention of 1920.

The assembling of a constitutional convention should be a difficult task, if other and simpler methods are provided for the alteration of the constitution in specific cases. Although some changes in detail should be made in the present section of the Illinois constitution with respect to the assembling of a constitutional convention, there may be some question as to whether the assembling of such a convention should be made easier.

Relation between two methods of constitutional alteration: The chief difficulty with respect to the alteration of the constitution of 1870 is that both methods prescribed for constitutional change are difficult of operation. The process of specific amendment is necessarily the simpler, and the less expensive. This process should be employed for changes ordinarily desired, leaving the assembling of a convention for the less frequent and more serious task of re-examination of the whole of the constitutional text. However, the two methods of constitutional change now provided by the constitution of Illinois do

[4] See Gardner, C. O., The working of the state-wide referendum in Illinois. American Political Science Review, V, 394 (1911)

not bear a proper relationship to each other, because the method of specific amendment is so difficult that constitutional revision of any important character must almost necessarily await the time when the need for change has become so serious as to force the assembling of a convention. The desirable results to be obtained from having two methods of constitutional alteration, the one simple and inexpensive, the other cumbersome and expensive, is, therefore, largely lost under the present constitutional provisions of Illinois.

Use of amending clause in Illinois since 1870: It is of course true that no constitutional convention has been assembled in Illinois between the years 1870 and 1920, and until 1909 no concerted and persistent effort had been made for the assembling of a constitutional convention.

However, the amending clause has been successfully employed seven times. During the period from 1892 to 1899 three proposed amendments were submitted. Upon the proposal submitted in 1892 for the amendment of the amending article, the negative vote was larger than the affirmative vote. Upon the proposed amendments of 1894 and 1896 and upon the proposed tax amendment of 1916 the affirmative vote was much greater than the negative vote. A table of amendments submitted is given below.

Amendments submitted since 1870.

Proposition.	Vote for.	Vote against.	Total vote on proposition.	Total vote at election.	Percentage of affirmative vote to total vote at election.	Percentage of vote on proposition to total vote at election.
1878 Drainage Amendment	295,960	60,081	356,041	448,796	65.94	79.33
1880 County Officers Amendment	321,552	103,966	425,518	622,306	51.67	68.37
1884 Amendment veto of separate items of appropriation bills	427,821	60,244	488,065	673,096	63.56	72.50
1886 Amendment abolishing contract convict labor	306,565	169,327	475,892	574,080	53.40	82.89
1890 Amendment authorizing Chicago bond issue for Columbian Exposition	500,299	55,073	555,372	677,817	73.81	81.93
1892 Amendment to amending article.	84,645	93,420	178,065	871 508	9.70	20.43
1894 Amendment to provide for labor legislation	155,393	59,558	214,951	873,426	17.79	24.61

Amendments submitted since 1870.—Concluded.

Proposition.	Vote for.	Vote against.	Total vote on proposition.	Total vote at election.	Percentage of affirmative vote to total vote at election.	Percentage of vote on proposition to total vote at election.
1896 Amendment to article on amendment	163,057	66,519	229,576	1,090,869	14.91	21.04
1904 Amendment providing for special legislation for Chicago	678,393	94,038	772,431	1,089,458	62.27	70.90
1908 Amendment to separate section on canal to authorize $20,000,000 bond issue	692,522	195,177	887,699	1,169,330	59.22	75.91
1916 Tax amendment to the constitution ..	656,298	295,782	952,080	1,343,381	48.85	70.87

Eleven proposed amendments have been submitted since 1870 of which seven have been adopted and of which four have failed. Attention however should be called to the fact that five of the amendments which have been adopted were voted upon before the official ballot law of 1891. Of the six amendments submitted since that time one received a smaller affirmative than negative vote, two were adopted, and three failed of adoption because not obtaining a majority of all votes cast in the general election.

As has been suggested above, the provision regarding the submission of an amendment to but one article of the constitution at the same session has in many sessions occasioned deadlocks and has prevented the submission of proposed amendments. The submission of proposed amendments by the general assembly has also been discouraged by the knowledge that it would be very difficult to obtain the adoption of such amendments.

Suggested changes in details of present amending clause: A number of points in the present article for the alteration of the constitution require comment in connection with possible changes:

(a) Section 1 of Article XIV requires for the calling of a convention a majority vote at the next general election. Section 2 requires for the adoption of a proposed amendment "a majority of the electors voting" at the next election of members of the general assembly. This variation in language might easily have been construed to indicate a variation in intent, and this view was actually taken by two members of the Supreme Court in the case of People v. Stevenson, 281 Ill. 17 (1917). The language in these two sections should be made uniform or clarified although the decision of the Supreme Court has already by interpretation accomplished the result of clearing up any ambiguity.

(b) Section 2 of Article XIV requires for the proposal of amendments a vote of two-thirds of all the members elected to each of the two houses. Article XIV, Section 1, provides for a vote, in submitting the question of calling a convention, of two-thirds of the members of each house of the general assembly. The language in these two places was probably intended to mean the same thing, but if the necessity for future judicial interpretation of one of these clauses is to be avoided, the language should be made uniform. The language of Section 2 is perfectly clear. The language of Section 1 may perhaps be more properly construed to require merely two-thirds of a quorum of each house although in view of the other provisions of the constitution regarding legislative votes, this may be doubtful. Language similar to that of Article XIV, Section 1, has been construed in other states to require merely two-thirds of a quorum, and a view supporting such a construction has recently been taken by the United States Supreme Court.[5]

(c) Article XIV, Section 1 of the constitution provides that delegates to a convention shall be elected in the same manner "as members of the senate". This has been almost necessarily construed to require partisan nomination and election of delegates in 1919. Such a result could in no way have been anticipated by the framers of the constitution of 1870, and if the result is not desired a change of the section should be made in this respect.[6]

(d) Article XIV, Section 1, of the constitution provides that the qualifications of members of the convention shall be the same as that of members of the senate. The result of this provision is to apply to delegates the provisions of Article IV, Sections 3 and 4 of the constitution, and to exclude members of the general assembly from membership in the constitutional convention unless they cease to be members of the general assembly. Such a result may or may not have been intended, but it should be borne in mind that permitting the present language to stand as it is will have the result indicated.

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[5] Green v. Weller, 32 Miss. 650 (1856); State v. McBride, 4 Mo. 303 (1836); Missouri Pacific Railway Co. v. Kansas, 248 U. S. 276 (1919).

[6] Manner of choosing delegates to the Illinois constitutional convention, published by the Citizens Association of Chicago, January, 1919.

III. AMENDING METHODS IN OTHER STATES.

Of the present state constitutions the provisions for specific amendment may be divided into six classes:

(1) The proposal of amendments by a constitutional convention only (New Hampshire);

(2) Amendment by the action of two successive legislatures, without a direct popular vote. (Delaware);

(3) Proposal by the legislature with a popular vote upon the proposal, but with the ultimate approval or rejection (South Carolina) or the insertion of the amendment into the constitution (Mississippi) left with the legislature after the people have approved a proposed amendment. It should be noted, however, that in Mississippi, initiated amendments take effect upon approval by the people.

(4) Amendments proposed by the legislature and subject to popular approval, but with the amending process subject to such restrictions as to make constitutional amendment difficult. Such restrictions are of three kinds:

(a) The requirement of action by two successive legislatures for the proposal of amendments. (Connecticut, Indiana, Iowa, Massachusetts, New Jersey, Nevada, New York, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, Wisconsin). Of the states enumerated here, attention should be called to the fact that Massachusetts in 1918 and Nevada in 1912 adopted a popular initiative for the proposal of constitutional amendments.

(b) Limitations as to the number, frequency and character of proposals. (Arkansas, Colorado, Illinois, Indiana, Kansas, Kentucky, Montana, New Jersey, Pennsylvania, Tennessee, Vermont.) Of these states, attention should be called to the fact that Colorado, (1910) adopted the initiative for the proposal of constitutional amendments, and that the initiative process is held to be free from the limitation upon the number of amendments that may be submitted; and that Arkansas, (1910) permits the popular initiative of constitutional amendments, but that in Arkansas the popular initiative of amendments is held subject to limitation as to the number of proposed amendments that may be submitted.

(c) Requirements of a popular vote greater than that of a majority of all persons voting upon the amendment. (Alabama, Arkansas, Connecticut, Illinois, Indiana, Minnesota, Mississippi, Nebraska, Oklahoma, Rhode Island, Tennessee, Wyoming). Arkansas (1910) permits the adoption of amendments proposed by initiative petition by a majority of those voting upon the question, but still requires for amendments proposed by legislative

action a majority of those voting at the election. Nebraska (1912) requires a 35 per cent affirmative vote of those voting at the election for amendments proposed by initiative petition and a majority of those voting at the election for amendments proposed by the legislature. Mississippi requires a majority of those voting at the election for constitutional amendments proposed by the legislature, but only a majority of those voting upon the question for amendments proposed by initiative petition. Amendments proposed by constitutional convention in New Hampshire must receive two-thirds of the vote cast upon the question for their adoption or rejection.

(5) The unrestricted proposal of amendments by one legislative action merely and adoption by a majority of the persons voting thereon. (Maryland, Michigan, Missouri, New Mexico, North Carolina, North Dakota, Ohio, Oregon, South Dakota, Texas, Utah, Washington, West Virginia.) It is possible that New Mexico should be placed in the group of states having restrictions as to the character of proposals, although the method of proposal under an amendment of 1912 is not difficult. The restrictions upon the legislative proposal of amendments in Colorado, Kansas and Montana are so slight as to make it proper to class the constitutions of these states here rather than among those difficult of amendment. South Carolina may also be classed with this group in so far as respects the proposal of and popular vote upon amendments.

(6) Those which in addition to the legislative power of proposal permit the popular initiation of constitutional amendments. (Arizona, Arkansas, California, Colorado, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon.)

The tendency has been steadily toward the easy amending process represented by the fifth type, and since 1902 there has been a rapid development in the use of the popular initiative for the amendment of constitutions. The group of states whose constitutions are least flexible is that of subdivision (c) of the fourth type; but where, in addition to the requirement of a majority of all votes at an election, there are other restrictions upon the amending process, the alteration of a constitution often becomes practically impossible. This is true of Tennessee, where we have a combination of limitations—not only is a majority of all votes for representatives required to be cast for an amendment, but amendments may only be proposed once in six years, and the action of two successive legislatures is required for such proposal. So, but to a less extent than in Tennessee, the amending procedure in Illinois and Indiana is burdened by restrictions to such an extent as to be practically unworkable, although the Indiana restrictions are more serious than those of Illinois.

The requirement of proposal by two successive legislatures, while it defeats many projects which would otherwise go to the people, cannot be said to interpose serious obstacles in the way of constitutional alteration, nor in fact even in the cases of Vermont, Tennessee, New Jersey, Pennsylvania and Illinois do the restrictions upon the proposal

of amendments interpose insuperable barriers, but when these provisions are combined with the requirement of a popular vote which is ordinarily impossible to obtain except upon questions of the greatest importance, as is done in Tennessee, the amending process becomes almost useless. Even where the restrictions are not so stringent, but where two legislative actions are required and the power of legislative proposal restricted, the amending process is slow and cumbersome, preventing a ready adjustment of the constitution to changing conditions. This is peculiarly true in view of the fact that substantially all of the state constitutions outside of New England contain numerous detailed provisions which may require frequent alteration.

The hindrances to constitutional change which have been devised are of two kinds: (1) Those which make any change difficult, and (2) those which make an actual change fairly easy but which provide a method of change requiring a long time for its operation. The provisions requiring a popular vote equal to that of a majority of all votes cast in a general election, belong to the first class. Those requiring two legislative actions and permitting the proposal of amendments only at long intervals belong to the second class. Certainly the requirement of a long time to obtain an amendment forms a check upon constitutional change. The limitation through the requirement of action by two successive legislatures is not serious in the small number of states still having annual legislative sessions, as in New York and South Carolina.

Limitations upon submission of constitutional amendments: There are twelve constitutions which impose limitations as to the number, frequency and character of proposed amendments. New Jersey permits the proposal of amendments only once in five years, Tennessee once in six years, and Vermont once in ten years. Pennsylvania provides that no amendment or amendments shall be submitted oftener than once in five years. The Illinois constitution provides that no amendments shall be proposed to more than one article of the constitution at the same session, and that the same article shall not be amended oftener than once in four years. Colorado (1876) provided that the legislature should not have power to propose amendments to more than one article at the same session, but this provision was amended in 1900 so as to permit the proposal of amendments to six articles at the same time, and even this limitation is held not to apply to initiated amendments.[1]

In Indiana, while an amendment agreed upon by one legislature is waiting the action of the succeeding legislature, no additional amendment may be proposed. A similar provision of the Oregon constitution was repealed in 1906. Arkansas, Kansas and Montana forbid the submission of more than three amendments at the same election, and the Arkansas limitation is held to apply to amendments

[1] People *ex rel.* Tate v. Provost, 55 Colo. 199 (1913).

proposed by initiative petition as well as to those proposed by the legislature.[2]

Kentucky forbids the submission of more than two amendments at the same time and provides that the same amendment shall not be submitted oftener than once in five years. The provisions in Arkansas, Florida, Kentucky, New Mexico and Texas that amendments may be submitted only at regular legislative sessions do not constitute a serious restriction upon the amending power. The New Mexico constitution provides that no amendment affecting certain matters relating to the elective franchise and education shall have effect unless it be proposed by a vote of three-fourths of the members elected to each house and ratified by a vote of the people in an election at which at least three-fourths of the electors voting in the whole state, and at least two-thirds of those voting in each county in the state, shall vote for such amendment. The New Mexico provision was intended for the purpose of giving guarantees to the Spanish speaking population. Certain restrictions upon the use of the initiative in proposing amendments are commented upon in another place.

The restrictions upon the proposal of amendments in Arkansas, Colorado, Kansas and Montana are relatively slight and have not proven troublesome, except in Arkansas where two methods of submission have come into conflict. However, the limitations in Pennsylvania, New Jersey, Vermont, Tennessee, Indiana and Illinois are so strict as to prevent the ready adaptation of the constitutions to changing conditions.

Legislative action in submitting constitutional amendments: The requirement of action by two successive legislatures was abandoned by Illinois in 1848, and the tendency throughout the country for some time has been directly away from such a plan. Of the nineteen constitutions adopted since 1885 all but three provided for action by one legislature only; Oregon by amendment of 1906 and North Dakota by amendment of 1918 have made a similar provision. In the states providing for only one legislative action, it has usually been customary to require such action to be taken by more than a majority of the legislature. Of the thirty-three constitutions to which amendments may now be proposed by one legislative action, nine permit such proposal by a majority vote (Arizona, Arkansas, Minnesota, Missouri, New Mexico, North Dakota, Oklahoma, Oregon, and South Dakota); seven require a three-fifths vote (Alabama, Florida, Kentucky, Maryland, Nebraska, North Carolina, Ohio); and seventeen require a vote of two-thirds of the members of each of the two houses (California, Colorado, Georgia, Idaho, Illinois, Kansas, Louisiana, Maine, Michigan, Mississippi, Montana, South Carolina, Texas, Utah, Washington, West Virginia and Wyoming).

In practically all the states the constitutions specify that the majorities required for the proposal of amendments shall be majorities of all members elected to each of the two houses, although in a

[2] State *ex rel.* Little Rock v. Donaghey, 106 Ark. 56 (1912).

few cases the requirement is that of a majority or a greater proportion of the members of the two houses. A reference has already been made above to the confusion likely to result through the fact that the convention clause of the Illinois constitution does not state a precise standard in this regard.

The rejected New York constitution of 1915 provided for a joint session of the two houses to consider a proposed amendment after either house had adopted such a proposal, leaving the action of each house to be taken separately, however. A use of joint sessions is prescribed in Massachusetts for the consideration of proposals of amendment initiated by popular petition.

Proposal by popular initiative: A separate pamphlet is devoted to the initiative and referendum, and in this pamphlet will be found a full analysis of the initiative and referendum provisions in all states which have applied the initiative to constitutional amendments. No effort will be made here to analyze the initiative provisions of state constitutions in detail, but a statement will be made sufficiently full to indicate the relationship of the popular initiative to other methods of altering state constitutions.

Of the states which have adopted the popular initiative, fourteen apply this institution to the proposal of constitutional amendments, so that in these states there are two methods of specific proposal of constitutional changes (Arizona, Arkansas, California, Colorado, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, Nevada, North Dakota, Ohio, Oklahoma and Oregon). The states of Oregon, Nevada, Missouri, Arkansas, Colorado and Mississippi permit the use of the initiative for the proposal of constitutional amendments in the same manner as for the proposal of laws. California substantially belongs in this group, the only distinction in this state being that for statutes there is both a direct and an indirect initiative, while for constitutional amendments there is merely a direct initiative.

In seven states distinctions are made between constitutional amendments and statutes. In Oklahoma, Arizona, Nebraska and North Dakota a larger petition is required to propose a constitutional amendment. In Oklahoma an eight per cent petition is sufficient for ordinary legislation, and a fifteen per cent petition is required for constitutional amendments. In Arizona and Nebraska the initiation of ordinary legislation is accomplished by a ten per cent petition, but for constitutional amendment a fifteen per cent petition is required. In North Dakota the initiation of a law requires a petition of 10,000 voters, and the initiation of a constitutional amendment requires a petition of 20,000. Michigan provides for an indirect initiative petition of eight per cent for ordinary legislation, and for a direct initiative petition of ten per cent for constitutional amendments. Ohio provides for an indirect initiative upon ordinary legislation with an original petition of three per cent and a supplemental petition of

an additional three per cent, but for a ten per cent direct initiative upon constitutional amendments. Massachusetts provides for a much more complex method of initiating constitutional amendments than for the initiation of statutes. Under the Massachusetts constitution, 25,000 voters may present an initiative petition for a constitutional amendment. The proposed amendment then goes before a joint session of the general court and three-fourths of the members voting in joint session may amend the proposal. If in such joint session an initiative amendment receives the affirmative vote of not less than one-fourth of all the members elected it is referred to the next general court. In the next general court if an initiative amendment or if a legislative substitute for such amendment receives the affirmative votes of at least one-fourth of all the members elected, the proposed amendment is submitted to the people at the next state election and is adopted if it is approved by a majority of those voting on the amendment, such majority equaling thirty per cent of the total number of ballots cast at the election.

Attention should be called particularly to the fact that Arkansas, Nebraska and Mississippi make the popular adoption of an amendment proposed by initiative petition easier than the popular adoption of an amendment proposed by legislative action. In Arkansas and Mississippi an amendment proposed by the legislature requires a majority of all votes cast at the election; an amendment proposed by popular petition requires merely a majority of the votes cast upon the question. In Nebraska an amendment proposed by legislative action requires a majority of all votes cast at the election; an amendment proposed by popular petition, an affirmative vote equal to thirty-five per cent of the total vote cast at the election.

The use of the popular initiative for constitutional amendments upon certain subjects is prohibited by a number of detailed provisions in Massachusetts. Nebraska and Massachusetts prohibit the proposal of the same measure oftener than once in three years, and Oklahoma provides that a measure rejected under the initiative and referendum shall not be again submitted in less than three years by less than a twenty-five per cent petition.

Popular vote required for the adoption of amendments: The constitution of Illinois requires that a proposed amendment in order to be adopted shall receive the votes of a majority of the electors voting at a general election.

At least nine other states[3] have requirements which either expressly or by interpretation require that a measure receive a majority of all votes cast at the election in which submitted, although in Alabama and Oklahoma amendments may be submitted at a special election,

[3] Alabama, Arkansas, Indiana, Minnesota, Mississippi, Nebraska, Oklahoma, Tennessee, Wyoming. Attention should be called to the fact that in Arkansas and Mississippi a majority of those voting upon the question is sufficient to adopt an amendment proposed by a popular petition, and in Nebraska a thirty-five per cent affirmative vote is sufficient to adopt a proposal presented by a popular petition.

where of course the majority of those voting upon the question is substantially equivalent to a majority of those voting at the election. Constitutional amendments, however, must ordinarily be submitted at general elections, even where this is not expressly required, because of the almost prohibitive expense of a special election.

Rhode Island requires that proposed amendments shall be approved by three-fifths of the electors of the state present and voting thereon, and New Hampshire requires the approval of two-thirds of the qualified voters present and voting upon a proposal.

The Michigan constitution of 1908 authorized a limited use of the initiative for the proposal of constitutional amendments, and required that such a proposed amendment in order to be adopted should receive a majority of the votes cast upon its adoption or rejection, and the affirmative vote should not be less than one-third of the highest number of votes cast at the same election for any office. Nebraska provides with respect to initiated amendments that they shall be adopted by a majority of the votes cast thereon provided that the favorable vote shall constitute thirty-five per cent of the vote cast at the election. The first proposed amending clause of the New Mexico constitution required that proposed amendments be submitted at a general election and receive an affirmative vote equal to at least forty per cent of all votes cast in the state and in at least half of the counties. In the New York convention of 1894 it was proposed that an amendment should be adopted by either of the following methods: (1) by a majority of all the electors voting at a general election, or by the affirmative vote of a majority of the electors voting thereon, provided that two-thirds of all the electors voting at an election voted thereon, or (2) if submitted at a special election provided that the affirmative vote equal a majority of all the electors voting at the last preceding general election; or by a vote of those voting thereon provided the vote at the special election equal two-thirds of the vote at the last preceding general election.

IV. REVISION OF CONSTITUTION THROUGH CONVENTION.

In view of the fact that a number of states have no provisions regarding the assembling of constitutional conventions, but actually employ such a convention, and in further view of details existing in various states with respect to the convention, it is difficult to summarize briefly the different types of constitutional provisions with respect to this matter. A statement is given below which seeks to summarize in several groups the provisions with respect to this matter in the several states, but attention should be called to the fact that this statement does not attempt any precise logical arrangement of these states:

(1) State with provision for change only by means of a constitutional convention. New Hampshire. This state requires a popular vote to assemble a convention, and popular approval of the convention's work.

(2) States having no provisions for constitutional conventions: Arkansas, Connecticut, Indiana, Louisiana, Massachusetts, Mississippi, New Jersey, North Dakota, Pennsylvania, Rhode Island, Texas and Vermont. In a number of these states conventions have actually been assembled in the absence of constitutional provisions for such conventions, and the generally accepted views is that the legislature may provide for the calling of a convention, even though the constitution contains no provision with reference thereto. A Rhode Island opinion constitutes an exception to this statement. In Indiana a recent judicial decision takes the view that in the absence of constitutional provision the legislature may call a constitutional convention, but that the proposal for such a convention must first be submitted to popular vote.[1]

(3) Provision merely authorizing legislature to call convention, without any limitations as to popular vote either for the calling of the convention or upon the work of the convention: Maine, Georgia.

(4) States which require the submission to the voters of the question of calling a constitutional convention. There are thirty-four states which now require such a submission: Alabama, Arizona, California, Colorado, Delaware, Florida, Idaho, Illinois, Iowa, Kansas, Kentucky, Maryland, Michigan, Minnesota, Missouri Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, West Virginia, Wisconsin, Wyoming.

[1] Bennett v. Jackson, 186 Ind. 533 (1917).

(5) States authorizing conventions and requiring a popular vote to assemble a convention but not expressly requiring the submission of the work of the convention to popular vote: Alabama, Delaware, Florida, Iowa, Kentucky, Kansas, Minnesota, Nevada, North Carolina, Oregon, South Carolina, South Dakota, Tennessee, Virginia, Wisconsin. Generally, however, constitutions have been submitted both in the states having no constitutional provisions regarding conventions and in the states having no requirements for submission to popular vote.

(6) States expressly requiring a popular vote to assemble a convention and also expressly requiring submission of the work of the convention to a popular vote. Of these there are nineteen: Arizona, California, Colorado, Idaho, Illinois, Maryland, Michigan, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York, Ohio, Oklahoma, Utah, Washington, West Virginia, Wyoming.

(7) Those requiring a periodical submission of the question of holding a constitutional convention: New Hampshire (seven years), Iowa (ten years), Michigan (sixteen years), Maryland, New York, Ohio (twenty years). The constitutions of Iowa, New York, Michigan and Ohio also contain provisions permitting submission of the question at other times than the ten, sixteen and twenty year periods. The Oklahoma constitution leaves to legislative discretion as to when the question shall be submitted, but requires that it be submitted once in every twenty years.

(8) Constitutions whose provisions regarding a constitutional convention are made completely independent of any legislative action: New York, Michigan.

The popular vote required to authorize a convention varies. Seventeen states either expressly or impliedly require that the necessary vote shall be a majority of those cast upon the subject of holding a convention: Arizona, California, Colorado, Delaware, Florida, Missouri, Montana, New Hampshire, New York, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Virginia, West Virginia, Wisconsin; and Kentucky has a similar provision with the additional requirement that the total number of votes cast for the calling of a convention be equal to one-fourth of the number of votes cast at the preceding general election. Twelve states require that the proposal of a convention shall be approved by a majority of those voting at a general election: Idaho, Illinois, Kansas, Maryland, Minnesota, Nebraska, Nevada, South Carolina, South Dakota, Utah, Washington, Wyoming. Alabama and Tennessee require a majority of the votes cast in the election in which a proposal is submitted, but permit such submission to be made at either a general or special election. Michigan requires a majority vote of electors qualified to vote for members of the legislature. The vote upon the question of holding a constitutional convention may also be taken at special elections in Missouri, Montana, Oklahoma, Virginia and West Virginia.

Upon the question of adopting or rejecting the work of a constitutional convention, Arizona, Michigan, Maryland, Nebraska, New

York, Ohio and Oklahoma require merely a majority of those voting upon the question of adoption or rejection. California, Colorado, Illinois, Missouri, Montana, and Utah require a majority of all persons voting at an election, but California expressly requires that such submission be at a special election, and Illinois and some other states permit submission either at a general or a special election.

Constitutions vary greatly in the extent to which they prescribe details regarding the composition and election of delegates to constitutional conventions. The constitution of Missouri makes the assembling of a convention independent of legislative action after the people have voted (upon legislative authorization) that a convention shall be held. The New York constitution of 1894 and the Michigan constitution of 1908 make a convention completely independent of legislative action, provided one is assembled as a result of the periodical votes required to be had upon the subject in these states. This independence of the convention was provided for first in New York because of the fact that a popular vote in favor of a constitutional convention was had in New York in 1886, but because of political differences, legislative provision for such convention was not made promptly and the convention did not actually assemble until 1894.

In some states which have adopted the popular initiative, the initiative provisions are sufficiently broad to permit of being used for the purpose of initiating a proposal for the holding of a constitutional convention. A power by initiative petition to force a vote upon the holding of a constitutional convention is not expressly found in any constitutional provision and results from implication, so that it is difficult to say in what states the popular initiative may be so used. However, the constitutional provisions for the popular initiative in Arizona, Michigan, Maine, Oregon, Missouri and Oklahoma seem to include a power to initiate a proposal for the holding of a constitutional convention.

V. ANALYSIS AND CONCLUSIONS.

Attention has already been called to the fact that in a group of states a majority of all of those voting at the election is required to adopt a constitutional amendment. These states are: Alabama, Arkansas, Illinois, Indiana, Minnesota, Mississippi, Nebraska, Oklahoma, Tennessee and Wyoming. It should again be repeated, however, that in Arkansas and Mississippi an amendment initiated by popular petition may be adopted by a majority voting thereon, and in Nebraska an amendment initiated by popular petition may be approved by an affirmative vote of thirty-five per cent of those voting in the election.

In the states just enumerated the amendment of constitutions has been particularly difficult, and this is especially true where the requirement of such a popular majority has coincided with other types of limitations upon the amendment of the constitution, as in Indiana and Illinois. In Illinois there have been relatively few votes upon constitutional amendments, and therefore relatively few rejections because of the great difficulty in proposing measures in the first place.

The requirement that a majority voting at the election shall vote in favor of a proposition in effect provides that all abstinence from voting shall be treated as negative voting, and it has often proven impossible to obtain even upon important questions an affirmative majority of the total vote cast in general elections. In states requiring a majority of those voting at the election, it has not been uncommon to submit a proposed amendment at frequent intervals in an effort to obtain the required majority. In Indiana a proposal permitting the legislature to prescribe qualifications for admission to the bar was submitted to the people in 1900, 1906 and 1910. Upon the first submission nearly sixty per cent of the voters expressed themselves either one way or the other upon this proposal, but in subsequent votes very few voters expressed themselves, apparently because of the feeling that voting upon constitutional amendments is a waste of time in that state.

A Minnesota proposal concerning the investment of school funds to which there was no strong opposition was submitted at three successive elections (1900, 1902 and 1904) before it received the required vote. Minnesota has had a somewhat similar experience with other proposals. In the Minnesota elections of 1912, 1914 and 1916 a number of proposed constitutional amendments failed of adoption, although some of those which failed in each of these elections received very nearly half of the total vote at the election. The same situation has presented itself in the other states having this requirement. In Oklahoma the constitution permits the submission of proposed amend-

ments at special elections, and a special election has been resorted to in at least one case, because at such an election the majority of those voting at the election is of course substantially equivalent to a majority of those voting upon the measure.

The great difficulty of obtaining for a proposed amendment a majority of all votes cast for the leading candidates at the same election has led several states in this group to devise methods of evading or avoiding the difficulty presented by their constitutional provisions.

The Alabama constitution of 1875 required that proposed amendments be submitted at a general election, and that in order to be adopted they should receive the vote of "a majority of all the qualified electors of the state who vote for representatives". The legislature in submitting a proposed amendment to the people in 1898 provided that the ballot should have printed on it the words "For Birmingham Amendment" and that "any elector desiring to vote for said amendment shall leave such words intact upon his ballot and any elector desiring to vote against such amendment shall evidence his intention to so vote by erasing or striking out said words with pen or pencil. The leaving of said words upon the ballot shall be taken as a favorable vote, and the erasure or striking out of said words as aforesaid shall be taken as an adverse vote upon said amendment". Under this provision the amendment was carried.[1]

Such a plan can not be employed under the Alabama constitution of 1901. Under the Alabama plan just referred to, inaction by the voter was counted as an affirmative vote, whereas the constitutional provision without such an arrangement counts inaction in the negative. A similar ballot was employed in New Jersey in 1897.

A Nebraska statute in 1901 provided that "a state convention of any political party may take action upon any constitutional amendment which is to be voted upon at the following election, and said convention may declare for or against such amendment, and such declaration shall be considered as a portion of their ticket. . ." Where a political party endorsed a proposed amendment, such endorsement was to be printed as a portion of the party ticket, and a straight party vote was counted for the amendment; and in the same manner if the party action were against the amendment a straight party vote would be counted against such amendment. In enacting a mandatory direct primary law in 1907 the Nebraska law required party action to be expressed upon proposed amendments. The Nebraska plan was copied by Ohio in 1902, and the Ohio law continued in force until 1908, when it was repealed for political reasons. However, in order to obtain a majority of the votes at the election upon the calling of a constitutional convention in 1910, Ohio adopted the same plan. Indiana has also provided for the use of this plan in certain cases.

What the Nebraska plan does is practically what was done in the state of Illinois before the official ballot act of 1891. Party endorsements were had and the party endorsement printed as a part of the straight party ticket. Voting the party ticket then automatically

[1] May & Thomas Hardware Co. v. Birmingham, 123 Ala. 306 (1908).

casts a vote upon the proposal, and all voters voting such a ticket are counted in accordance with their party's action.

Such a plan is of course merely a subterfuge which results in the counting in the affirmative rather than in the negative of those who will not or do not take sufficient interest to vote upon a measure, provided the party has endorsed the measure.

Such a plan is possible under the present Illinois constitution, but it seems clearly more desirable to adopt some requirement of a popular majority that can actually be made effective, than to indulge in subterfuges for the purpose of counting an affirmative majority when none actually exists.

The experience of Illinois seems to indicate that there is no material difficulty in obtaining an affirmative vote upon a measure of forty per cent of those voting for candidates, although some questions have occasionally not received so large a vote.

If proposed amendments are to be submitted at a general election and some proportion of the total vote at the election is to be required, it would be unwise to adopt a plan of requiring that a certain percentage (say two-thirds or seventy per cent) shall have voted upon the question. It may be that upon a proposal there is practically no negative vote, but an affirmative vote equal to one-half of the total vote cast at the election. The total vote both for and against may not equal two-third or seventy per cent but the popular will has been clearly expressed by a majority of the total vote at the election. If a plan is to be adopted it should be that of a proportion between the affirmative vote and the total vote cast. So, for example, it might be required that a measure should receive a majority of the total vote cast upon its adoption or rejection, provided such majority equal forty per cent of the total vote cast in the election.

Use of the Initiative: Attention has already been called to the fact that in fourteen states the popular initiative may be used for constitutional amendments. In the states which permit the use of this institution 160 amendments have been proposed by a popular petition and of these 58 were adopted, that is a percentage of 36.25. In these same states within the same period 185 constitutional amendments were proposed by the legislature of which 81 were adopted, that is, a percentage of 43.78.

Relation between the constitution and statutes: To a large extent the distinction in substance between state constitutions and state statutes has disappeared through the practice of embodying detailed legislative enactments into the constitutions. Of course it is possible to say that detailed provisions devised to meet temporary needs are out of place in a constitution and should not be put there at all. The fact remains however that most constitutions do contain detailed pro-

visions. So long as constitutions are filled with matters of legislative detail, which must necessarily be subject to frequent change, a constitution which does not take this fact into consideration and make provision for such change, is defective.

Of course, even matters of importance, perhaps properly placed in a constitution at one time, do require change, and an amending clause should be so adjusted as to permit change in such matters. However, the incorporation into a constitution of a large amount of legislative detail makes essential an amending process which may be almost as easy as the process for the enactment of ordinary legislation.

The increasing detail in state constitution has been largely responsible for the disappearance of the distinction in form of enactment between statutes and constitutions in a number of states. In 1776 and for some time thereafter a relatively slight difference existed between the forms of constitutional and statutory enactment. The distinction became much clearer in later years, and toward the middle of the nineteenth century we have a well defined notion that state constitutions should not be easily subject to change. In fact this nation went much too far and resulted in the tying up of constitutional detail in such a manner as seriously to hamper further progress.

More recently, and particularly during the past twenty years, there has been a tendency to weaken quite materially the distinction in form of enactment between constitutions and statutes. This distinction in a number of states has disappeared because of the increased popular participation in legislation through the referendum. In the earlier period the most fundamental distinction between statutes and constitutional amendments was that amendments were required to be voted upon by the people, while statutes were infrequently submitted to a popular referendum. Twenty states now have constitutional provisions for an initiative and referendum upon ordinary legislation, and two states a provision for the referendum upon ordinary legislation. The constitutions of Oregon, Nevada, Missouri, Arkansas, Colorado and Mississippi, in their provisions for an initiative and referendum, place the enactment of statutes through these institutions upon precisely the same basis as the adoption of constitutional amendments, and California makes very little distinction between the two. In seven states which have the initiative and referendum, distinctions are made between the use of the initiative for constitutional amendments and its use for ordinary legislation.[2]

In state constitutional development in this country two alternatives are possible:

(a) That of practically abolishing the distinction in content between the state constitution and ordinary legislation, placing all desired detail in the constitution, and making the constitution substantially as easy to change as is an act of the legislature.

(b) The embodying into the constitution of only matters of more distinct and permanent importance, retaining some distinction in form of enactment between the constitution and statutes. Of course, even under this latter alternative a relatively easy method of constitutional

[2] Arizona, Massachusetts, Michigan, Nebraska, North Dakota, Ohio, Oklahoma.

amendment may be desirable, but the amending methods need not be so easy as under the first plan.

It may, therefore, be said that the determination of the type of amending clause rests primarily upon the determination as to what type of constitution is to be adopted. There is a distinct advantage in retaining the distinction between constitutions and statutes, and under our constitutional provisions in this country (except in Delaware) a popular vote is necessary in practically all cases for constitutional change. To increase the detail in the constitution, and make the constitution subject to alteration only upon a popular vote will, therefore, increase the number of measures upon which the people must be asked to express themselves, and whatever may be said in favor of a power in the people (through popular petition) to compel the submission of legislative or other proposals, there is little to be said in favor of a constitutional compulsion requiring the submission to the people of numerous matters of relatively small importance.

Conclusion: In the State of Illinois the present amending method is generally recognized as too difficult. In 1892 and 1896 proposals for the alteration of the amending clause were submitted to a popular vote, and the vote upon these proposals will be found upon page 180 of this pamphlet. One of the proposals was rejected by virtue of an unfavorable popular majority; the other failed because of the small amount of popular vote upon it. Reference should again be made to the fact that these proposals were submitted in a period when the ballot form made it difficult for the people to vote upon a proposed constitutional amendment. The text of these two rejected amendments is printed in the appendix to this pamphlet.

Attention should again be called to the fact that in this and other states there are two amending or revising processes for constitutional change. One of these processes is cumbersome and difficult of operation, and should be reserved only for extraordinary occasions. The other, as it now exists in Illinois is also difficult of operation, but the simpler method of constitutional change should be relatively easy of operation and should be employed when it is necessary to make specific or relatively minor changes in the constitutional text. In framing amending clauses for a future constitution, particular attention should be directed to the harmony of these two types of provisions.

Recently there has been a tendency to use constitutional conventions for the purpose of proposing a series of specific constitutional amendments, and in several cases conventions have submitted a number of proposed amendments rather than a revised constitution. The Ohio convention of 1912 submitted forty-two proposed amendments to the people. All constitutional conventions in New Hampshire since 1792 have submitted a series of proposals each of which might be separately accepted or rejected by the voters. The Massachusetts conventions of 1820, 1853 and 1917-19, each submitted a series of pro-

posed amendments. The convention of 1917-19 submitted twenty-two amendments all of which were adopted. A convention continues to be needed, however, for the periodical re-examination of a constitution, and if the changes to be recommended are numerous, those not of a controversial character may more properly be submitted in the form of a revised constitution, for to submit each change separately (when the matter is one over which there is no controversy) is to burden the voter unnecessarily.

Attention should also be called to the fact that the type of amending clause to be placed in a constitution depends to a large extent upon the type of constitution which is to be adopted. Detail in a constitution is undesirable, but detail in a constitution is all the more undesirable if it is coupled with an amending clause which makes the amendment of such detail substantially impossible.

It is difficult to indicate constitutional provisions from other states which are satisfactory for adoption in Illinois, and this difficulty is accentuated by the fact that no provision can be suggested as desirable unless it is first known what type of constitution is to be in existence, and how much detail is likely to be in such a constitution. The New York and Michigan plans with respect to a constitutional convention have distinct advantages, for in many states difficulties have presented themselves through making the assembling a constitutional convention dependent upon legislative action.

In an appendix to this study are printed the rejected amendments of 1892 and 1894, the proposed Chicago Bar Association amendment to the amending clause, the text of the public policy questions of November, 1919, the text of a proposal by the Chicago Woman's Club, and the full text of the amending clause of the Michigan constitution.

The appendix also includes a tentative draft of a plan for the combination of legislative proposal and popular initiation of amendments. This draft combines elements of rejected proposals in Wisconsin and Illinois, and is presented merely in order that the various phases of the subject may be put in concrete form. For the indirect initiation of constitutional amendments, the Wisconsin plan proceeds upon the assumption that there will be no difficulty about introducing a proposed amendment in the general assembly. A petition for the introduction of a proposed amendment seems unnecessary under such a plan, although, if it were desired, the two methods of proposal could be adopted. Other types of the initiative in use for the proposal of constitutional amendments will be found in the appendix to Bulletin No. 2 on the initiative, referendum and recall.

APPENDIX.

1. The Illinois Constitution of 1870, Article XIV:

Sec. 1. Whenever two-thirds of the members of each house of the General Assembly shall, by a vote entered upon the journals thereof, concur that a convention is necessary to revise, alter or amend the Constitution, the question shall be submitted to the electors at the next general election. If a majority voting at the election vote for a convention, the General Assembly shall, at the next session, provide for a convention, to consist of double the number of members of the Senate, to be elected in the same manner, at the same places and in the same districts. The General Assembly shall, in the Act calling the convention, designate the day, hour and place of its meeting, fix the pay of its members and officers, and provide for the payment of the same, together with the expenses necessarily incurred by the convention in the performance of its duties. Before proceeding, the members shall take an oath to support the Constitution of the United States and the State of Illinois, and to faithfully discharge their duties as members of the convention. The qualification of members shall be the same as that of members of the Senate, and vacancies occurring shall be filled in the manner provided for filling vacancies in the General Assembly. Said convention shall meet within three months after such election and prepare such revision, alteration or amendments of the Constitution as shall be deemed necessary, which shall be submitted to the electors for their ratification or rejection at an election appointed by the convention for that purpose, not less than two or more than six months after the adjournment thereof; and unless so submitted and approved by a majority of the electors voting at the election, no such revision, alteration or amendments shall take effect.

Sec. 2. Amendments to this Constitution may be proposed in either house of the General Assembly, and if the same shall be voted for by two-thirds of all the members elected to each of the two houses, such proposed amendments, together with the ayes and nays of each house thereon, shall be entered in full on their respective journals, and said amendments shall be submitted to the electors of this State for adoption or rejection, at the next election of members of the General Assembly, in such manner as may be prescribed by law. The proposed amendments shall be published in full at least three months preceding the election, and if a majority of the electors voting at said election shall vote for the proposed amendments, they shall become a part of this Constitution. But the General Assembly shall have no power to propose amendments to more than one article of this Constitution at the same session nor to the same article oftener than once in four years.

2. Chicago Bar Association Amendment:

Amendments to this Constitution may be proposed in either house of the General Assembly, and if the same shall be voted for by two-thirds of all the members elected to each of the two houses, such proposed amendments, together with the ayes and nays of each house thereon, shall be entered in full on their respective journals; and said amendments shall be submitted to the electors of this state for adoption or rejection, at the next election of members of the General Assembly in such manner as may be prescribed by law. The proposed amendments shall be published in full at least three months preceding the election, and if a majority of the electors voting at said election shall vote for the proposed amendments, they shall become a part of this constitution. But the General Assembly shall have no power to propose amendments to more than five articles of the constitution at the same session.

3. Public Policy Questions, Nos. 1 and 2, submitted to the electors November 4, 1919:

"Question No. 1—Shall the members of the Fifth Constitutional Convention be instructed to submit a proposal for the Initiative and Referendum; the term Initiative as herein used, meaning the power to bring proposed laws and Constitutional Amendments to popular vote, at any regular election, by petition of 100,000 electors at large, all measures so submitted to become laws when approved by a majority of those voting thereon; the term Referendum, as herein used, meaning the power to suspend specified act or acts of the legislature, by petition of 50,000 electors at large, until such act or acts shall have been referred to popular vote and approved by a majority of those voting thereon; said powers of the Initiative and Referendum also to be understood as being extended by the Constitution to the electors of every municipality and other political subdivision or district of the State, and to apply to all local, special and municipal legislation, in or for their respective municipalities and sub-divisions or districts?

Question No. 2—Shall the members of the Fifth Constitutional Convention be instructed to submit the proposal for the Initiative and Referendum, as defined in Question No. 1, for a separate vote, in such manner that said proposal, if approved by a majority of those voting thereon, shall take effect, either as part of a new constitution or as an amendment of Article 4, Section 1, of the present constitution?"

4. Proposal of the Chicago Woman's Club:[1]

"1. Whenever [two-thirds] (a majority) of the members of each house of the General Assembly shall, by a vote entered upon the

[1] Words in present Article XIV to be deleted are in brackets. Words to be inserted are in parentheses.

journals thereof, concur that a convention is necessary to revise, alter, or amend the Constitution, the question shall be submitted to the electors at the next general election. If a majority voting [at the election] (thereon) vote for a convention, the General Assembly shall, at the next session, provide for a convention, to consist of [double] the (same) number of members [of] (as) the Senate, to be elected [in the same manner] (at the same time), at the same places, and in the same districts. The General Assembly shall, in the Act calling the convention, designate the day, hour, and place of its meeting, fix the pay of its members and officers, and provide for the payment of the same, together with the expenses necessarily incurred by the convention in the performance of its duties. Before proceeding, the members shall take an oath to support the Constitution of the United States and the State of Illinois, and to faithfully discharge their duties as members of the convention. The qualification of members shall be the same as that of members of the Senate, and vacancies occurring shall be filled in the manner provided for filling vacancies in the General Assembly. Said convention shall meet within three months after such election and prepare such revision, alteration, or amendments of the Constitution as shall be deemed necessary (which shall be published by the Secretary of State in full at least three months before the election at which they are to be voted upon.) [which] (They) shall be submitted to the electors for their ratification or rejection at an election appointed by the convention for that purpose, not less than two or more than six months after the adjournment thereof; and [unless] (each such revision, alteration, or amendment) so submitted and approved by] a majority of the electors voting [at the election, no such revision, alteration or amendments shall take effect.] (thereon, shall become a part of this constitution).

2. Amendments to this constitution may be proposed in either house of the General Assembly, and if the same shall be voted for by [two-thirds] (a majority) of all the members elected to each of the two houses, such proposed amendments, together with the ayes and nays of each house thereon, shall be entered in full on their respective journals, and said amendments shall be submitted to the electors of this state for adoption or rejection, at the next election of members of the General Assembly, in such manner as may be prescribed by law. The proposed amendments shall be published (by the Secretary of State) in full at least three months preceding the election, and if a majority of the electors voting [at said election] (on any amendment) shall vote for [the proposed] (that) amendment, [they] (it) shall become a part of this constitution. But the General Assembly shall have no power to propose amendments [to more than one article of this constitution at the same session nor] to the same article oftener than once in four years.

(3. Amendments to this constitution may also be proposed by petition of one-tenth of the qualified voters of this State. Every such petition shall include the full text of the amendment so proposed and be signed by at least one-tenth as many qualified voters of the State as voted at the preceding general election for State Treasurer. In-

itiative petitions proposing an amendment to this constitution shall be filed with the Secretary of State at least four months before the election of members of the General Assembly at which election such proposed amendment is to be voted upon. Upon receipt of such petition by the Secretary of State, he shall canvass the same to ascertain if such petition has been signed by the requisite number of qualified electors, and if the same has been so signed, the proposed amendment shall be published by the Secretary of State in full at least three months preceding the election and submitted to the electors of this State for adoption or rejection, and if a majority of the electors voting on such an amendment, shall vote for that amendment, it shall become a part of this constitution.)"

5. Tentative draft of combination of the initiative and the legislative proposal of amendments:[2]

Section 1. *At the general election to be held in the year 1938, and every twentieth year thereafter, and also at such times as the* General Assembly, by a vote of two-thirds of *all* the members *elected to each* of the two houses, *with the yeas and nays of each house* entered upon the journals thereof, shall provide, the question *of holding a convention* to revise, alter or amend the constitution shall be submitted to the electors *of the state.* A convention shall be held *if a majority voting upon the question vote for a convention, provided such majority be not less than one-third of the total number voting at the election if it is a general election, or if it is a special election provided such majority be not less than one-third of the vote cast at the last preceding general election. If the electors shall decide in favor of a convention, the General Assembly shall at the next session* provide for a convention to consist of double the number of members of the Senate, to be elected at the same places and in the same districts. The General Assembly shall, in the act calling the convention, designate the day, hour and place of its meeting, fix the pay of its members, and provide for the payment of the same together with the expenses necessarily incurred by the convention in the performance of its duties. Before proceeding, the members shall take an oath to support the constitutions of the United States and *of* the State of Illinois, and to discharge faithfully their duties as members of the convention. The qualifications of members shall be the same as that of members of the Senate, and vacancies occurring shall be filled in the manner provided for filling vacancies in the General Assembly. Said convention shall meet within three months after such election, and prepare such revision, alteration or amendments of the constitution as shall be deemed necessary, *which shall be published in full within two weeks after the adjournment of the convention and* shall be submitted to the electors for their ratification or rejection at an election appointed by the convention for that purpose not less than two nor more than six months

[2] New matter is italicized. That not italicized is present language of Illinois Constitution.

after the adjournment thereof. Such revision, alteration, or amendments *shall be adopted upon approval by a majority of the electors voting thereon, provided such majority be not less than one-third of the total number voting at the election if it is a general election or if it is a special election provided such majority be not less than one-third of the total vote cast at the last preceding general election; and any revision, alteration or amendments so adopted shall take effect on the first day of January next after such approval, unless another date shall be specified in the revision, alteration or amendment itself.*

Section 2. Amendments to this constitution may be proposed in either house of the General Assembly, and if the same shall be voted for by two-thirds of all the members elected to each of the two houses, such proposed amendments, together with the yeas and nays of each house thereon shall be entered in full on their respective journals.

A petition signed by qualified electors of the state equal to ten percentum of the votes cast for governor at the last preceding election (not more than one-half of whom shall be residents of any one county) may require the submission to the people of any amendment proposed in either house of the general assembly, either in its original form or with any amendments proposed in either house. However if such a proposed amendment shall be placed upon its final passage in each house and fails in either house to receive the affirmative votes of one-third of all members elected to such house it shall not be so submitted. The petition shall be filed with the secretary of state within six months after the adjournment of the General Assembly, and shall contain the full text of the proposed amendments whose submission is required. Petitions shall be verified by affidavits of those obtaining the signatures. The Governor, Attorney General and Secretary of State shall constitute a board to pass upon the sufficiency of petitions, and when a petition is approved by them its sufficiency shall not be questioned in any court. A finding of the board that a petition is not sufficient may be reviewed upon a petition for mandamus filed in the Supreme Court within thirty days. These provisions are self-executing, but the General Assembly may enact appropriate legislation regulating the verification of signatures, and other matters connected with the preparation and presentation of petitions.

Amendments proposed either by the General Assembly or as a result of popular petition in the manner provided above shall be submitted to the electors of this state for adoption or rejection at the next general election, *unless the General Assembly by a vote of two-thirds of all the members elected to each of the two houses shall order a special election for that purpose. The proposed amendments shall be submitted* in such manner as may be prescribed by law, and shall be published in full at least three months preceding the election. If a majority of the electors *voting thereon shall vote for the proposed amendments, they shall become a part of this constitution, provided such majority be not less than one-third of the total number voting at the election if it is a general election, or if it is a special election, provided such majority be not less than one-third of the total vote cast at*

the last preceding general election. When two or more amendments are submitted at the same election they shall be so submitted as to enable the electors to vote upon each amendment separately. Every amendment shall take effect on the first day of January next after its approval, unless another date shall be specified in the amendment itself. No amendment submitted to and approved by the people shall be held invalid if in its proposal and adoption there has been substantial compliance with the terms of this section.

6. Constitution of Michigan, Article XVII:

Section 1. Any amendment or amendments to this constitution may be proposed in the senate or house of representatives. If the same shall be agreed to by two-thirds of the members elected to each house, such amendment or amendments shall be entered on the journals, respectively, with the yeas and nays taken thereon; and the same shall be submitted to the electors at the next spring or autumn election thereafter, as the legislature shall direct; and, if a majority of electors qualified to vote for members of the legislature voting thereon shall ratify and approve such amendment or amendments, the same shall become part of the constitution.

Sec. 2. Amendments may also be proposed to this constitution by petition of the qualified voters of this state. Every such petition shall include the full text of the amendment so proposed and be signed by not less than ten per cent of the legal voters of the state. Initiative petitions proposing an amendment to this constitution shall be filed with the secretary of state at least four months before the election at which such proposed amendment is to be voted upon. Upon receipt of such petition by the secretary of state, he shall canvass the same to ascertain if such petition has been signed by the requisite number of qualified electors, and if the same has been so signed, the proposed amendment shall be submitted to the electors at the next regular election at which any state officer is to be elected. Any constitutional amendment initiated by the people as herein provided, shall take effect and become a part of the constitution if the same shall be approved by a majority of the electors voting thereon and not otherwise. Every amendment shall take effect thirty days after the election at which it is approved. The total number of votes cast for governor at the regular election last preceding the filing of any petition proposing an amendment to the constitution, shall be the basis upon which the number of legal voters necessary to sign such a petition shall be computed. The secretary of state shall submit all proposed amendments to the constitution initiated by the people for the adoption or rejection in compliance herewith. The petition shall consist of sheets in such form and having printed or written at the top thereof such heading as shall be designated or prescribed by the Secretary of State. Such petition shall be signed by qualified voters in person only, with the residence address of such persons and the date of signing the same. To each of such petitions, which may

consist of one or more sheets, shall be attached the affidavit of the elector circulating the same, stating that each signature thereto is the genuine signature of the person signing the same, and that to the best knowledge and belief of the affiant each person signing the petition was at the time of signing a qualified elector. Such petition so verified shall be *prima facie* evidence that the signatures thereon are genuine, and that the persons signing the same are qualified electors. The text of all amendments to be submitted shall be published as constitutional amendments are now required to be published. (Amendment ratified at April election, 1913).

Sec. 3. All proposed amendments to the constitution submitted to the electors shall be published in full, with any existing provisions of the constitution which would be altered or abrogated thereby, and a copy thereof shall be posted at each registration and election place. Proposed amendments shall also be printed together with any other special questions to be submitted at such election in full on a single ballot separate from the ballot containing the names of the candidates or nominees for public office. (Amendment ratified at November election, 1918).

Sec. 4. At the general election to be held in the year nineteen hundred twenty-six, in each sixteenth year thereafter and at such other times as may be provided by law, the question of a general revision of the constitution shall be submitted to the electors qualified to vote for members of the legislature. In case a majority of such electors voting at such election shall decide in favor of a convention for such purpose, at the next biennial spring election the electors of each senatorial district of the state as then organized shall elect three delegates. The delegates so elected shall convene at the state capitol on the first Tuesday in September next succeeding such election, and shall continue their sessions until the business of the convention shall be completed. A majority of the delegates elected shall constitute a quorum for the transaction of business. The convention shall choose its own officers, determine the rules of its proceedings and judge of the qualifications, elections and returns of its members. In case of a vacancy by death, resignation or otherwise, of any delegate, such vacancy shall be filled by appointment by the governor of a qualified resident of the same district. The convention shall have power to appoint such officers, employes and assistants as it may deem necessary and to fix their compensation, and to provide for the printing and distribution of its documents, journals and proceedings. Each delegate shall receive for his services the sum of one thousand dollars and the same mileage as shall then be payable to members of the legislature, but such compensation may be increased by law. No proposed constitution or amendment adopted by such convention shall be submitted to the electors for approval as hereinafter provided unless by the assent of a majority of all the delegates elected to the convention, the yeas and nays being entered on the journal. Any proposed constitution or amendments adopted by such convention shall be submitted to the qualified electors in the manner provided by such convention on the first Monday in April following the final adjourn-

ment of the convention; but, in case an interval of at least ninety days shall not intervene between such final adjournment and the date of such election, then it shall be submitted at the next general election. Upon the approval of such constitution or amendments by a majority of the qualified electors voting thereon such constitution or amendments shall take effect on the first day of January following the approval thereof.

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